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Opinion following remand from Supreme Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TOMMY PETE ZARATE, Defendant and Appellant.	E054970 (Super.Ct.No. INF10002307) OPINION

APPEAL from the Superior Court of Riverside County. Mark E. Johnson, Judge. Affirmed.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Steve Oetting, Michael Pulos and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

The California Supreme Court has ordered that we vacate our previous opinion in this matter and reconsider the cause in light of *People v. Conley* (2016) 63 Cal.4th 646

(*Conley*). Having now reconsidered the cause in light of *Conley*, we conclude that the judgment should be affirmed in its entirety.

I. INTRODUCTION

Defendant and appellant Tommy Pete Zarate appeals from his conviction of being a felon in possession of a firearm (Pen. Code,[1] former § 12021, subd. (a)(1); count 1), carrying a concealed weapon (former § 12025, subd. (b)(1); count 2), and being a felon in possession of ammunition (former § 12316, subd. (b)(1); count 3), along with true findings on enhancement allegations of two prior strike convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).

Defendant contends the trial court erred in (1) refusing to allow him to call a witness to testify about statements against interest made by a third party that supported the defense of third party culpability; (2) denying his motion to suppress the evidence of the firearm found in his vehicle because he had a reasonable expectation of privacy in the contents of the searched vehicle, and the scope of the search exceeded the parameters of a legitimate probation search; (3) failing to traverse the search warrant and suppress evidence of the ammunition found in his motel room because the search warrant affidavit was based on the illegally obtained evidence found in his car, or, in the alternative, he was denied effective assistance of counsel; and (4) denying the motion for a new trial based on newly discovered evidence that a third party had confessed to possessing the firearm and ammunition. He further contends his sentence of life imprisonment was

[1] Further statutory references are to the Penal Code except as otherwise indicated.

cruel and unusual punishment.[2] In a supplemental brief, he argues his sentence should be vacated and the case remanded for resentencing under Proposition 36, the Three Strikes Reform Act of 2012 (the Reform Act).

In our initial opinion in this matter, we agreed that defendant's sentence should be vacated and the case remanded for resentencing under Proposition 36. *Conley*, however, requires a different result, and we find no other error. The judgment will therefore be affirmed in its entirety.

II. FACTS AND PROCEDURAL BACKGROUND

On October 22, 2010, Officer Bryan Traynham pulled defendant over because the car defendant was driving had a broken brake light. Louie Aguilar was a front seat passenger in the car. The officer submitted defendant's and Aguilar's information to the dispatcher and learned that Aguilar had a warrant for his arrest and was "on probation with full search terms."

Officer Traynham told defendant and Aguilar that he was going to search Aguilar and the areas of the car within his immediate control. Defendant objected to the search. The officer searched the passenger seat, glove box, passenger side door, and center console. In the center console, he found a loaded .357 revolver and an envelope with the name "Tommy" on it.

Defendant and Aguilar were both arrested and taken to the police station. Defendant asked if he could talk to Aguilar so they could "get their stories on the same

[2] Defendant initially asserted that the judgment should be modified to award him presentence custody credits; however, he has withdrawn that contention.

page," or get their stories straight, but Officer Traynham did not allow it. Defendant was later released while Aguilar remained in custody.

While defendant was out of custody, he talked to Victor Diego, the manager of the motel where he lived. He told Diego the police had pulled him over and found the gun in his car. He said he was going to get another gun but could not do so legally because he had a criminal record.

Based on the gun found in defendant's car, the police obtained a search warrant for the motel room where he lived. On October 28, 2010, the officers executed the search warrant. They found a box of .357 ammunition and 17 rounds of .38 Special ammunition in the room's main dresser. They also found two boxes of 12-gauge shotgun ammunition, several boxes of nine-millimeter ammunition, one box of .22-caliber ammunition, and a .50-caliber bullet in a bag on top of a television stand. They found two documents bearing defendant's name and one document bearing Aguilar's name in the room.

Defendant was arrested for possession of ammunition. After he was given *Miranda*[3] warnings, he told the police that the ammunition found in his motel room belonged to him, but he did not know it was illegal for him to have it. He said he was the only one who lived in the motel room. The officer asked about the bullets in the gun that had been found in his car, and defendant responded that he did not want to answer because his "friend" was going to "take that charge."

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

Defendant testified in his own behalf. He denied making admissions to the police or making the statements to Diego. He had registered himself and his three children as residents of the motel room, and Aguilar lived there too. He did not know that ammunition was in the dresser drawers, and the ammunition did not belong to him. The .50-caliber round found in the motel room was a souvenir dummy round he had bought at a yard sale. He also did not know that Aguilar had a gun in the car, and he had never seen the gun.

Defendant's sister and brother testified that Aguilar stayed with defendant in the motel room and kept his belongings there.

The jury found defendant guilty of being a felon in possession of a firearm (former § 12021, subd. (a)(1); count 1), carrying a concealed weapon (former § 12025, subd. (b)(1); count 2), and being a felon in possession of ammunition (former § 12316, subd. (b)(1); count 3). The trial court found true enhancement allegations of two prior strike convictions. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)

The trial court sentenced defendant to consecutive terms of 25 years to life for each of counts 1 and 3. The court stayed the term for count 2 under section 654.

Additional evidence is set forth in the discussion of the issues to which it pertains.

III. DISCUSSION[4]

A. Exclusion of Evidence

Defendant contends the trial court erred in refusing to allow him to call a witness to testify about statements against interest made by a third party that supported the defense of third party culpability.

1. Additional Background

Aguilar invoked his Fifth Amendment privilege against self-incrimination and refused to testify. The trial court found him unavailable as a witness. The trial court then conducted a hearing under Evidence Code section 402 to determine whether defense witness Branden Mays would be permitted to testify about a conversation with Aguilar about a month before the traffic stop; defendant argued Aguilar's statements to Mays were admissible as against his penal interest under Evidence Code section 1230.

Mays testified out of the presence of the jury that he knew defendant and had known Aguilar since junior high school. A month or two before Halloween in 2010, Aguilar approached Mays at his work, said he was trying to get rid of a firearm, and asked if Mays was interested in purchasing a firearm or knew anyone else who was interested. Aguilar said the firearm was a revolver, but he did not show Mays the firearm or further describe it. Mays was not interested.

The trial court found Mays's testimony credible, but ruled that Aguilar's statements to him did not qualify as a declaration against penal interest, and Mays's testimony about Aguilar's statements was therefore inadmissible.

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[4] Only sections E and F of our discussion differ substantively from our previous opinion.

2. Analysis

"A criminal defendant may introduce evidence of third party culpability if such evidence raises a reasonable doubt as to his guilt . . . ." (*People v. Abilez* (2007) 41 Cal.4th 472, 517.) However, "to be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate . . . a reasonable doubt . . . must link the third person either directly or circumstantially to the actual perpetration of the crime." (*People v. McWhorter* (2009) 47 Cal.4th 318, 367.)

Here, defendant's proffered evidence—statements Aguilar purportedly made to Mays—was hearsay. Defendant argues the evidence was admissible under the exception to the hearsay rule for statements against the declarant's interest. (Evid. Code, § 1230.)[5] "Whether a statement is one against penal interest is a preliminary fact to be determined under [Evidence Code] section 405. [Citation.] The test imposed is an objective one—would the statement subject its declarant to criminal liability such that a reasonable person would not have made the statement without believing it true." (*People v. Jackson* (1991) 235 Cal.App.3d 1670, 1678, fn. omitted.)

The first element of admissibility under Evidence Code section 1230 was established—the trial court found Aguilar was unavailable as a witness. However, as the trial court pointed out, there was no evidence that Aguilar actually possessed a gun when

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[5] "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230.)

he asked if Mays was interested in purchasing a gun. For a statement to be admissible under Evidence Code section 1230, it must be "'*distinctly*' against the declarant's penal interest," not just possibly against his interest. (*People v. Jackson, supra*, 235 Cal.App.3d at p. 1677, italics added.)

Moreover, even if Aguilar did possess a firearm at the time of his conversation with Mays, there was no evidence it was the same firearm found in defendant's car one or two months later. We conclude the trial court did not abuse its discretion in excluding Mays's testimony about his conversation with Aguilar.

B. Denial of Motion to Suppress Evidence Found in Defendant's Vehicle

Defendant contends the trial court erred in denying his motion under section 1538.5 to suppress the evidence of the firearm found in his vehicle because he had a reasonable expectation of privacy in the contents of the searched vehicle, and the scope of the search exceeded the parameters of a legitimate probation search.

1. Additional Background

Defendant moved before trial to suppress evidence seized from his vehicle following the traffic stop and evidence later seized from his motel room. Officer Traynham testified that he conducted the traffic stop of defendant's vehicle about 9:32 p.m. on October 22, 2010, because a brake light was out. Defendant was driving, and Aguilar was sitting in the front passenger seat. Both defendant and Aguilar identified themselves, and the officer conducted a records check of them. He learned that Aguilar was on felony probation with "full search terms." Officer Traynham testified he believed that meant "immediate search of the person, anything he's in control of, whether it is his place of residency, vehicle, . . . anything he's in immediate control of." The officer

informed defendant and Aguilar that he was going to search the area where Aguilar was sitting, and defendant protested. The officer asked defendant to get out of the vehicle, asked if he had any illegal weapons, and searched defendant's person after obtaining his permission to do so. Meanwhile, the officer learned that Aguilar had a felony warrant for his arrest; Aguilar was taken into custody and placed in the patrol car.

Officer Traynham searched the front passenger area of defendant's car where Aguilar had been sitting, including the glove box and center console. In the center console, he found a Ruger revolver. The officer testified, based on his training and experience, that he believed Aguilar might have put something in the center console because it was a high crime area, Aguilar was on probation and had a felony warrant for drugs, and Aguilar likely realized the chance of his getting searched was high.

Officer Patrick Biggers testified that on October 28, 2010, he had executed a search warrant on defendant's motel room. He had obtained the warrant "to look for further evidence of the handgun that Officer Traynham found in [defendant's] vehicle." The officers found several hundred rounds of ammunition of various calibers in the room; some of the ammunition would fit the handgun found in defendant's car. The ammunition was found in a dresser drawer and on top of a television stand. The officers found "one or two items of dominion" that indicated defendant lived there, and they also found one letter belonging to Aguilar. Officer Biggers arrested defendant for possession of the ammunition. Defendant agreed to speak to the officer after receiving his *Miranda* admonitions. He told the officer "he didn't know that it was illegal for him to possess the ammunition and that he didn't believe that . . . he would be charged with possession of

the gun based on the ammunition, because his friend, Mr. Aguilar, who was in the car, had agreed to take responsibility for the gun."

2. Analysis

We review challenges to the admissibility of evidence obtained by a police search and seizure under federal constitutional standards. (*People v. Schmitz* (2012) 55 Cal.4th 909, 916.) "A warrantless search is unreasonable under the Fourth Amendment unless it is conducted pursuant to one of the few narrowly drawn exceptions to the constitutional requirement of a warrant. [Citations.] California's parole search clause is one of those exceptions." (*Ibid.*) In *Schmitz*, the court addressed "the permissible scope of a parole search that infringes on the privacy of a third party driving a car with a parolee passenger," including "the permissible scope of the search of the car's interior" and "the permissible scope of a search of property located in the car." (*Id.* at p. 917.) The court held that "a vehicle search based on a passenger's parole status may extend beyond the parolee's person and the seat he or she occupies. Such a search is not without limits, however. The scope of the search is confined to those areas of the passenger compartment where the officer reasonably expects that the parolee could have stowed personal belongings or discarded items when aware of police activity. Within these limits, the officer need not articulate specific facts indicating that the parolee has *actually* placed property or contraband in a particular location in the passenger compartment before searching that area. Such facts are not required because the parole search clause explicitly authorizes a search 'without cause.'" (*Id.* at p. 926, fn. omitted.) The court noted, however, that the facts did not involve "a search of closed compartments of the car like the glove box, center console, or trunk," and the court "express[ed] no opinion on

whether a search of such closed-off areas could be based solely on a passenger's parole status. The reasonableness of such a search must necessarily take into account all the attendant circumstances, including the driver's legitimate expectation of privacy in those closed compartments, the passenger's proximity to them, and whether they were locked or otherwise secured." (*Id.* at p. 926, fn. 16.) The court further stated there was "no . . . reason to limit a parole search to the area within the parolee's reach *at the moment of the search.* [Rather], an officer has a compelling interest in detecting criminal activity by a parolee regardless of whether the parolee has been safely removed from the car and secured." (*Id.* at pp. 927-928, fn. 19.)

Because *Schmitz* dealt with a parole search rather than a probation search and because the court expressly did not address the search of a closed compartment within a vehicle, the case provides only general guidance rather than a direct resolution of the issue before us. In *People v. Baker* (2008) 164 Cal.App.4th 1152, 1159, the court stated the following principles: "When executing a parole or probation search, the searching officer may look into closed containers that he or she reasonably believes are in the complete or joint control of the parolee or probationer. [Citations.] This is true because the need to supervise those who have consented to probationary or parolee searches must be balanced against the reasonable privacy expectations of those who reside with, ride with, or otherwise associate with parolees or probationers. . . . While those who associate with parolees or probationers must assume the risk that when they share ownership or possession with a parolee or probationer their privacy in these items might be violated, they do not abdicate all expectations of privacy in all personal property. The key

question remains: whether there is joint ownership, control, or possession over the searched item with the parolee or probationer. [Citations.]"

We conclude the officer properly searched the center console as part of his valid probation search of Aguilar. The center console was under the control of and easily accessible to both defendant and Aguilar, defendant's front seat passenger. Indeed, defendant's primary defense, that the handgun found in the console belonged to Aguilar, fundamentally depended on Aguilar's having joint control of the console. The trial court did not err in admitting into evidence the gun found during that search.

C. Denial of Motion to Suppress Evidence Found in Defendant's Motel Room

Defendant next contends the trial court erred in failing to traverse the search warrant and suppress evidence of the ammunition found in his motel room because the search warrant affidavit was based on the illegally obtained evidence found in his car, or, in the alternative, he was denied effective assistance of counsel because his counsel failed to move to suppress evidence of the ammunition. Because we have concluded that the evidence found in his car was legally obtained, we reject both contentions.

D. Denial of Motion for New Trial

Defendant contends the trial court erred in denying the motion for a new trial based on newly discovered evidence that a third party had confessed to possessing the firearm and ammunition.

1. Additional Background

Defendant moved for a new trial on the ground of newly discovered evidence. In support of the motion, defendant submitted the declaration of Jesus Cruz Valenzuela. The declaration stated that Valenzuela had been in custody in the Indio jail and had been

housed for three months with Aguilar. Aguilar told Valenzuela details of his and defendant's arrest and the charges pending against defendant. Aguilar "specifically said to [Valenzuela] that the firearm located by police in the center console of [defendant's] car belong[ed] to him, Mr. Aguilar. He said further that when the police initiated the traffic stop, it was his intention to run. He informed [defendant] that he was going to run. [Defendant] told him not to run. He then told [defendant] that and said, 'But I got this,' indicating the gun. Mr. Aguilar then placed the gun . . . in the center console before the police officer approached the vehicle."

Valenzuela further declared that Aguilar said that "the ammunition from the motel room also belonged to him." Aguilar expected defendant to bail him out, and when defendant failed to do so after several weeks, Aguilar "became frustrated, and decided he had no reason to own up to the gun and ammunition possession charges because [defendant] was the only one charged." Aguilar told Valenzuela that he had obtained the weapon in exchange for a tattoo he had done for someone.

Valenzuela was represented by the same attorney as defendant and performed yard work for the attorney after being released from custody in March 2011. On May 8, 2011, Valenzuela asked the attorney about defendant's case and learned that the jury had found defendant guilty. Valenzuela "then told [the attorney] about [his] jail contacts with Mr. Aguilar, and the statements Mr. Aguilar made about his role in the incidents." Following a hearing, the trial court denied the motion.

2. Standard of Review

This court reviews the trial court's ruling on a motion for new trial under the deferential abuse of discretion standard. (*People v. Howard* (2010) 51 Cal.4th 15, 43.)

3. Analysis

The trial court may grant a new trial "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." (§ 1181, cl. (8).) "In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: '"1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits."' [Citations.]" (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) The trial court may consider the credibility of the evidence was well as its materiality in determining whether introducing the evidence in a new trial would make a different result reasonably probable. (*People v. Howard*, *supra*, 51 Cal.4th at p. 43.)

Assuming for purposes of argument that the evidence was newly discovered and could not with reasonable diligence have been discovered earlier and produced at trial, the trial court nonetheless found that Valenzuela's declaration was not credible, and moreover, it was inconsistent with stronger evidence that supported the verdict. Specifically, the trial court found that Valenzuela's declaration was inconsistent with Diego's trial testimony that defendant admitted the gun was his, with police testimony that defendant admitted the ammunition was his, and with defendant's history of firearms that undermined any suggestion that defendant would have had no idea there was a significant amount of ammunition in the small motel room. Thus, the trial court found it not reasonably probable that a new trial would yield a different result.

We conclude the trial court did not abuse its discretion in denying the motion for new trial.

E. Effect of Proposition 36

Defendant contends his sentence should be vacated and the case remanded for resentencing under the Reform Act. In our initial opinion in this matter, we agreed. *Conley*, however, requires a different conclusion.

1. Proposition 36

Under the Three Strikes law as it existed before the passage of the Reform Act, a defendant with two or more strike priors who is convicted of any new felony would receive a sentence of 25 years to life. (Former § 667, subd. (e)(2)(A).) As amended, section 667 provides that a defendant who has two or more strike priors is to be sentenced pursuant to paragraph 1 of section 667, subdivision (e)—i.e., as though the defendant had only one strike prior—if the current offense is not a serious or violent felony as defined in section 667.5, subdivision (c) or section 1192.7, subdivision (c), unless certain disqualifying factors are pleaded and proven.[6] (§§ 667, subds. (d)(1) & (e)(2)(C).)

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[6] Section 667, subd. (e)(2)(C) provides that second strike sentencing does not apply if the prosecution pleads and proves any of the following:

"(i) The current offense is a controlled substance charge, in which an allegation under Section 11370.4 or 11379.8 of the Health and Safety Code was admitted or found true.

"(ii) The current offense is a felony sex offense, defined in subdivision (d) of Section 261.5 or Section 262, or any felony offense that results in mandatory registration as a sex offender pursuant to subdivision (c) of Section 290 except for violations of Sections 266 and 285, paragraph (1) of subdivision (b) and subdivision (e) of Section 286, paragraph (1) of subdivision (b) and subdivision (e) of Section 288a, Section 311.11, and Section 314.

[footnote continued on next page]

The Reform Act also provides a procedure that allows a person who is "presently serving" an indeterminate life sentence imposed pursuant to the Three Strikes law to petition to have his or her sentence recalled and to be sentenced as a second strike offender, if the current offense is not a serious or violent felony and the person is not otherwise disqualified. The trial court may deny the petition even if those criteria are met, if the court determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126, subds. (a)-(g).) Accordingly, under section 1170.126, resentencing is discretionary even if the defendant meets the objective criteria

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[footnote continued from previous page]
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"(iii) During the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.

"(iv) The defendant suffered a prior serious and/or violent felony conviction, as defined in subdivision (d) of this section, for any of the following felonies:

"(I) A 'sexually violent offense' as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code.

"(II) Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than he or she as defined by Section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than he or she as defined by Section 286, or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than he or she, as defined by Section 289.

"(III) A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288.

"(IV) Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive.

"(V) Solicitation to commit murder as defined in Section 653f.

"(VI) Assault with a machine gun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245.

"(VII) Possession of a weapon of mass destruction, as defined in paragraph (1) of subdivision (a) of Section 11418.

"(VIII) Any serious and/or violent felony offense punishable in California by life imprisonment or death."

(§ 1170.126, subds. (f) & (g)), while sentencing under section 667, subdivision (e)(2)(C) is mandatory, if the defendant meets the objective criteria.

Had defendant been sentenced under the new version of the law, he would have received a sentence of double the determinate term for his conviction of possessing cocaine for sale. (§ 667, subds. (e)(1) & (e)(2)(C).)

2. Conley

In *Conley*, the California Supreme Court ruled that, by enacting Proposition 36, "[t]he voters authorized defendant and others similarly situated to seek resentencing under the recall provisions of section 1170.126, but they did not intend to confer a right to automatic resentencing under the amended penalty provisions of the Reform Act." (*Conley, supra*, 63 Cal.4th at pp. 661-662.) It further noted that "[d]efendants with nonfinal judgments who did not file petitions for recall of sentence within the mandated two-year period (see Pen. Code, § 1170.126, subd. (b)) because they were litigating the question of automatic resentencing will generally have good cause for filing late petitions (*ibid.*), and therefore they will not be deprived of the resentencing mechanism that the electorate created for them." (*Id.* at p. 662, fn. 5.)

Under *Conley*, therefore, Proposition 36 does not automatically entitle defendant to have his sentence vacated and the case remanded for resentencing. He should, however, be permitted to file a petition for recall in the trial court, and to have that petition heard on its merits.

F. Cruel and Unusual Punishment

Defendant contends his sentence of life imprisonment was cruel and unusual punishment, in light of the circumstance that his current offenses are "relatively minor."

In our initial opinion, this contention was rendered moot by our ruling that defendant's sentence should be vacated and the matter remanded to the trial court for resentencing. In light of *Conley*, the matter is no longer moot. It is, however, unripe. As noted, defendant may file a petition for recall of his sentence pursuant to Proposition 36. We therefore need not reach the constitutional issue defendant raises, at least unless and until such a petition is denied.

IV. DISPOSITION

Pursuant to the September 14, 2016 order of the California Supreme Court, our opinion in this matter, filed November 5, 2013, is vacated.

Having reconsidered the cause in light of *Conley*, as required by the California Supreme Court's September 14, 2016 order, we affirm the judgment without prejudice to defendant filing a petition for recall of sentence pursuant to § 1170.126, subdivision (b), in the trial court.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

MCKINSTER
J.

MILLER
J.